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SOVEREIGN LIABILITY FOR TORTIOUS ACTS OF ITS WARDS OCCASIONED BY FAILURE TO EXERCISE PROPER CUSTODIAL CARE

Periodically the public reads of the injury of a citizen other than a state employee at the hands of a former mental patient who either escaped because of inadequate guarding or was released from a state or federal institution because of an improper release-diagnosis. The public assumes that the injured party will be reimbursed, but who will bear the burden of reimbursement? Confinement often leaves the patient judgment-proof; the employee whose negligence allowed the escape is frequently judgment proof; the employee who negligently certified the release of an unrehabilitated patient is clothed with immunity from suit on his release-discretion;¹ and in a vast majority of jurisdictions the courts are closed to tort actions against the sovereign.²

Realizing the inequities of the above situation, Nebraska has

¹ 60 Stat. 845 (1946), as amended, 28 U.S.C. § 2680 (a) provides: "Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty. . . ."; *St. George v. State*, 283 App. Div. 245, 127 N.Y.S.2d 147, 150 (3d Dep't 1954); *Schwenk v. State*, 205 Misc. 407, 129 N.Y.S.2d 92 (Ct. Cl. 1953).

² It is a general rule that the sovereign cannot be sued in tort without its consent. *McCartney v. State*, 156 F.2d 739 (4th Cir. 1946). This case cites as a foundation of the doctrine, the case of *Hans v. Louisiana*, 134 U.S. 1 (1890). This rule has been abrogated in New York. N.Y. Court Claims Act § 2. It has been eliminated in the federal jurisdiction. Federal Tort Claims Act, 60 Stat. 842-847 (1946), as amended, 28 U.S.C. §§ 1346, 2671-2678 (1952) provides: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances" Eighteen states have waived their immunity to suit. These waivers apply generally to (1) contracts or (2) torts arising out of the state's proprietary capacity. Anderson, *Claims Against States*, 7 Vand. L. Rev. 234, 241 (1954).

provided for a legislative tort claims board.³ In addition, bills to establish state liability in situations where the doctrine of respondeat superior would make a private employer liable for the torts of his employees have been introduced into the last two sessions of the Nebraska legislature.⁴

Both bills were defeated,⁵ but opposition was to the procedure and not the principle; and in light of the national trend, the eventual passage of a Nebraska tort liability act seems quite probable.⁶ Therefore, it is hoped that this note will provide the following: (1) an analysis of problems concerning mental hospitals, which have been experienced by other jurisdictions under their tort claims acts; acts which will serve as a pattern for legislators to follow in drafting Nebraska's tort immunity waiver, (2) a guide for Nebraska courts which will be called upon to interpret such an immunity waiver, and (3) a guide for practitioners before and members of the present Nebraska Sundry Claims Board.

I. THE CUSTODIAL DUTY

A. *Duty*

Under the New York Court of Claims Act, which is similar

³ See Neb. Rev. Stat. § 81-857 (Reissue 1950) (Sundry Claims Board); for claims related to a prisoner's tortious acts which have been allowed, see Neb. Laws c. 93, p. 720 (1951) (car damage and loss of clothing when kidnapped by escaped prisoners); Neb. Laws c. 202, p. 660 (1947) (articles taken by two convicts and injuries inflicted by an escapee from the State Reformatory). For additional examples of claim boards, see Anderson, *Claims Against States*, 7 Vand. L. Rev. 234, 239 (1954).

⁴ Legislative Bill 334 was introduced in the sixty-sixth session of the Nebraska legislature. The bill provided for suit against the state on "... claims ... caused by negligence or wrong of a state officer or employee acting in the scope of his employment in cases where the state, if a private person, would be liable. . . ." It was considered and indefinitely postponed. Legislative Bill 350, worded identically with its predecessor, was introduced into the sixty-seventh session of the Nebraska legislature. This bill was killed in committee.

⁵ *Ibid.*

⁶ There has been strong agitation for the waiver of tort immunity by states. Borchard, *Tort Claims against Government: Municipal, State and Federal Liability*, 33 A.B.A.J. 221 (1947); Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. Rev. 1363, 1414 (1954); Note, *State Liability Acts*, 6 Baylor L. Rev. 135 (1953); Munnecke and Gold, *Does the King Pay for Tort in Pennsylvania?*, 12 U. of Pitt. L. Rev. 198 (1951); Note, *Liability of State for Tortious Acts of its Employees*, 5 Miami L.Q. 515 (1951); Kuchel, *Should California Accept Tort Liability?*, 25 Calif. S.B.J. 146 (1950); Note, *Governmental Immunity for Suit and Liability in Texas*, 27 Tex. L. Rev. 337 (1949); Note, *Governmental Tort Liability in Indiana*, 23 Ind. L.J. 468 (1948); Note, *State Immunity from Tort Liability*, 8 Mont. L. Rev. 45 (1947).

to the proposed Nebraska legislation,⁷ the New York courts have imposed upon state mental institutions the same custodial duties as are imposed upon private institutions by the common law. Thus the state has a duty (1) to protect mental patients and visitors within state institutions from the tortious acts of dangerous mental patients,⁸ (2) to protect the mental patients from self-inflicted harm or self-destruction,⁹ and (3) to protect the individual members of society from the tortious acts of escaped mental patients.¹⁰

In contrast, although the Federal Tort Claims Act (F.T.C.A.) subjects the federal government to tort liability in the same manner as a private individual would be liable,¹¹ a specific provision

⁷ The New York act states: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the rules of law as applied to actions in the supreme court against individuals or corporations. . . ." Nebraska's proposed act reads: ". . . in cases where the state, if a private person, would be liable. . . ."

⁸ *Scolavine v. State*, 297 N.Y. 460, 74 N.E.2d 174 (1947) (assault of fellow-inmate); *Flaherty v. State*, 296 N.Y. 342, 73 N.E.2d 543 (1947) (duty described but recovery denied); *Rossing v. State*, 47 N.Y.S.2d 262 (Ct. Cl. 1944) (visitor injured); *Joachim v. State*, 180 Misc. 963, 43 N.Y.S.2d 167 (Ct. Cl. 1943) (visitor injured). For cases involving private institutions see *Sylvester v. Northwestern Hospital*, 236 Minn. 384, 53 N.W.2d 17 (1952) (assault by fellow inmate); *University of Louisville v. Hammock*, 127 Ky. 564, 106 S.W. 219 (1907).

⁹ *Burman v. State*, 188 Misc. 153, 67 N.Y.S.2d 271 (Ct. Cl. 1947) (death by exposure after escape); *Shattuck v. State*, 166 Misc. 271, 2 N.Y.S.2d 353 (Ct. Cl. 1938) (loss of legs from exposure after escape). For cases involving private institutions, see *Lexington Hospital v. White*, 245 S.W.2d 927 (Ky. 1952) (injuries while escaping); *Fowler v. Norways Sanatorium*, 112 Ind. App. 347, 42 N.E.2d 415 (1942) (self-destruction); *Dahlberg v. Jones*, 232 Wis. 6, 285 N.W. 841 (1939) (exposure after escape); *Paulen v. Shinnick*, 291 Mich. 288, 289 N.W. 162 (1939) (self-inflicted injuries); *Hawthorne v. Blythewood*, 118 Conn. 617, 174 Atl. 81 (1934) (self-destruction); *Emory University v. Shadburn*, 47 Ga. App. 643, 171 S.E. 192, aff'd, 180 Ga. 595, 180 S.E. 137 (1933) (injury while escaping); *Maki v. Murray Hospital*, 91 Mont. 251, 7 P.2d 228 (1932) (injury while escaping).

¹⁰ *Benson v. State*, 52 N.Y.S.2d 239 (Ct. Cl. 1944) (burning of a barn); *Jones v. State*, 267 App. Div. 254, 45 N.Y.S.2d 404 (3d Dep't 1943) (assault on person outside walls after escape); *Weihs v. State*, 267 App. Div. 233, 45 N.Y.S.2d 542 (3d Dep't 1943) (stabbed a woman after escape). For cases involving private institutions, see *Torrey v. Riverside Sanitarian*, 163 Wis. 71, 157 N.W. 552 (1916) (duty present but recovery denied).

¹¹ 60 Stat. 845 (1946), as amended, 28 U.S.C. §§ 1346(b). 2671-2680 (1952); *Van Zuch v. United States*, 118 F. Supp. 468 (E.D.N.Y. 1954); *Sigmon v. United States*, 110 F. Supp. 906 (W.D. Vir. 1953).

of the act excludes claims arising out of an assault and battery.¹² This section has been interpreted to exclude claims which arise when a guard's negligent supervision gives an inmate the opportunity later to assault a claimant.¹³ The federal government's duty in this area is limited to (1) the protection of its mental patients from self-destruction or harm¹⁴ and (2) protection of mental patients and individual members of society from negligent, as contrasted to intentional, injuries received at the hands of an escaped mental patient.

The federal court's interpretation of the "assault and battery" exception has been criticized on the grounds that it has created artificial and inequitable distinctions in this and other areas of possible sovereign liability.¹⁵ In light of this criticism and the success which the New York courts have experienced with their waiver statute, which does not have an assault and battery exception, it is urged that the Nebraska legislators refrain from burdening any proposed waiver statute with the assault exception.

B. Standards of Care and Violations thereof

The inherent unpredictability of the mentally ill when coupled with the tensions and strains of confinement can create a dangerous potential. Thus, an institution's primary standard of care is based on the general character of its patients and the nature of the institution.¹⁶

In addition, if an institution has notice of a mental patient's especially dangerous propensities, it is charged with a secondary standard of guarding against such propensities.¹⁷ The New York

¹² 60 Stat. 842-847 (1946), as amended, 28 U.S.C. § 2680 (1952) provides: "The provisions of this chapter and section 1346(b) of this title shall not apply to . . . (h) any claim arising out of assault, battery"

¹³ *Wilcox v. United States*, 117 F. Supp. 119 (S.D.N.Y. 1953).

¹⁴ *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952).

¹⁵ Note, Torts—Federal Tort Claims Act—Exception as to Assault and Battery, 34 Neb. L. Rev. 567 (1955).

¹⁶ Restatement, Torts § 319 (1934) (those in charge of persons having dangerous propensities should control them to prevent the person from rendering possible harm to third persons); *Jones v. State*, 267 App. Div. 254, 45 N.Y.S.2d 404 (3d Dep't 1943) (failure to exercise degree of care reasonably required in view of the mental condition of some of the inmates).

¹⁷ *Rossing v. State*, 47 N.Y.S.2d 262, 263 (Ct. Cl. 1944). The court stated, "The degree of care which the law exacts from those in charge of institutions for the insane towards its patients is such reasonable care

courts have held that individual laxity in guarding,¹⁸ use of improper methods of restraint,¹⁹ inadequate supervision caused by over-crowding and understaffed conditions,²⁰ and the failure of one section of a mental institution to notify other sections of the institution of a patient's dangerous propensities²¹ are all violations of the standard of care.

An institution's standard of care is based on the nature of its inmates, and the standard may vary with the methods employed to discover the nature of these inmates. The New York cases have set up a vague requirement of discovery by employing such terms as "propensities which are known or should have

and attention for their safety and the safety of others as their mental and physical condition, if known, may require, and should be in proportion to the physical or mental ailments of such patients." *Weihs v. State*, 267 App. Div. 233, 45 N.Y.S.2d 542 (3d Dep't 1943). In *Shattuck v. State*, 166 Misc. 271, 273, 2 N.Y.S.2d 353, 356 (Ct. Cl. 1938) the court stated, ". . . In this court we held that the first escape was notice to the hospital authorities of the patient's propensities in that regard, and that they should have heeded the warning and taken measures to prevent the subsequent escape. . . ."

¹⁸ *Joachim v. State*, 180 Misc. 963, 43 N.Y.S.2d 167 (Ct. Cl. 1943). For cases involving private institutions, see *Lexington Hospital v. White*, 245 S.W.2d 927 (Ky. 1952) (left alone without proper surveillance despite known eloping tendencies); *Paulen v. Shinnick*, 291 Mich. 288, 289 N.W. 162 (1939) (nurse momentarily ceased to watch patient after having unlocked screen); *Hawthorne v. Blythewood*, 118 Conn. 617, 174 Atl. 81 (1934) (attendant on constant watch went to get some breakfast).

¹⁹ *Fowler v. Norways Sanitorium*, 112 Ind. App. 347, 42 N.E.2d 415 (1942).

²⁰ *Scolavino v. State*, 297 N.Y. 460, 74 N.E.2d 174 (1947) (68 patients in a disturbed ward with only two attendants, and no effort made to keep patients under constant observation); *Burtman v. State*, 188 Misc. 153, 67 N.Y.S.2d 271 (Ct. Cl. 1947) (hospital had insufficient help which caused supervision of recreation area to be inadequate, thereby allowing an escape); *Rossing v. State*, 47 N.Y.S.2d 262 (Ct. Cl. 1944) (institution was approximately 40% overcrowded. One attendant in "disturbed ward" of 56 inmates. "The overcrowding of the hospital and the failure to have a sufficient number of attendants in charge of these patients who were known at times to be violent . . ." caused the situation.); *Benson v. State*, 52 N.Y.S.2d 239 (Ct. Cl. 1944) (patient assigned to outside detail under untrained gardener who had not been informed of the patient's tendencies); *Jones v. State*, 267 App. Div. 254, 45 N.Y.S.2d 404 (3d Dep't 1943) (135 patients in disturbed ward with only one attendant; management failed to take precautions against fact that key was missing).

²¹ *Benson v. State*, 52 N.Y.S.2d 239 (Ct. Cl. 1944).

been known,"²² "from past experience"²³ and "in light of their experience."²⁴ It has never been held that the institutions are required to take notice of any more than the mental patient's acts within the institution. Thus, where a mental patient's dangerous tendencies have been dormant during incarceration, the institution's standard of care is negligible since the institution's discovery methods will not pinpoint the possible danger.

A much more realistic method of discovery would be to require an extensive institutional investigation of each patient's pre-confinement background through such sources as interviews of relatives, questionnaires to home town police and schools, F.B.I., and similar reports.

C. Liability for Failure in Custodial Duties

The test of a New York institution's liability for its employee's negligence is well defined in *Shattuck v. State*, where the court stated:

Although claimant's injuries were the immediate result of exposure in severely cold weather, the negligence of the state was the proximate cause, as its wrong started in motion a sequence of events which could have been readily foreseen and which in no way were deflected or changed by the intervention of any independent forces²⁵

Under this test the New York courts have held that it is foreseeable that an inmate will (1) do unreasonable things, (2) take advantage of opportunities to escape, (3) effect escape by violence if necessary, and (4) vent destructive urges on persons or property after his escape;²⁶ and thus have held the state liable for negligence. The foreseeable risk has been held not to include an epileptic drowning in a horsetank when overcome by a seizure while doing ordinary daily chores around an institution,²⁷ or an escaped inmate being struck and killed by a train while he was wandering down a railroad track.²⁸

²² *Joachim v. State*, 180 Misc. 963, 967; 43 N.Y.S.2d 167, 171 (Ct. Cl. 1943).

²³ *Flaherty v. State*, 296 N.Y. 342, 346, 73 N.E.2d 543, 544 (1947).

²⁴ *DiFiore v. State*, 275 App. Div. 885, 888, 88 N.Y.S.2d 815, 817 (3d Dep't 1949).

²⁵ 166 Misc. 271, 274, 2 N.Y.S.2d 353, 356 (Ct. Cl. 1938).

²⁶ See notes 8, 9, and 10 supra.

²⁷ *McPartland v. State*, 277 App. Div. 103, 98 N.Y.S.2d 665 (3d Dep't 1950).

²⁸ *Calabria v. State*, 263 App. Div. 1056, 34 N.Y.S.2d 820 (4th Dep't), aff'd, 289 N.Y. 613, 43 N.E.2d 836 (1942).

II. THE REHABILITATIVE DUTY

A. *The Duty*

Both the New York and the federal courts have stated that the incarceration of the mentally-ill is for a double purpose: for the protection of society from the dangerous tendencies of the mentally-ill and for the rehabilitation of the patients so they may return to society as useful citizens.²⁹ The effectuation of the latter requires a determination by some governmental employee of the time when it is advisable, from the standpoint of both society and the inmate, to place the inmate into immediate contact with society; viz, the release discretion.

²⁹ *Schwenk v. State*, 205 Misc. 407, 129 N.Y.S.2d 92, 99 (Ct. Cl. 1954); *Excelsior v. State*, 296 N.Y. 40, 69 N.E.2d 553 (1946). By statute the state of New York has a duty to release an inmate when he is deemed sane. Under Neb. Rev. Stat. § 83-340 (1943) the state must release when the inmate is "cured." By negative inference it could be argued that the state has a duty not to release an inmate until he has recovered or at least is no longer a danger to society. See N.Y. Mental Hygiene Law § 87(1), (3). Section 70 of this law uses the words "care" and "treatment." See also Neb. Rev. Stat. §§ 83-306, 307, 307.01 (1943) which speak in terms of "care and treatment" and "rehabilitation." These words might imply a duty upon the state and a liability to individual members of society for a failure to treat inmates properly. This duty is also founded upon protective, financial, and humanitarian principles. Besides protection of society from maladjusted individuals and elimination of the self-destructive anxieties of the mentally ill, the financial policies supporting the duty of rehabilitation are avoidance of the cost of (1) apprehending and re-confining the mentally ill and (2) losing productive citizens. There have been only two federal cases involving the release of an apparently unrehabilitated mental patient. *Smart v. United States*, 111 F. Supp. 907 (W.D. Okla. 1953); *Kendrick v. United States*, 82 F. Supp. 430 (N.D. Ala. 1949). Both cases denied recovery. It appears that the federal courts have adopted the "duty of rehabilitation" as a device to modify the duty of protection. This device is illustrated in two New York cases where it was held that the state's duty of protection to society must be sacrificed to the state's duty of rehabilitation. *Schwenk v. State*, 205 Misc. 407, 129 N.Y.S.2d 92 (Ct. Cl. 1953); In *Excelsior v. State*, 296 N.Y. 40, 46, 69 N.E.2d 553, 556 (1946) the court said, "A balance must be struck between contending interests—(1) the state's duty to take care of its mental defective wards with an eye toward returning them to society more useful citizens, and (2) the state's concern that the inmates of the institution cause no injury or damage to the property of those in the vicinity. That balance may be hard to achieve. We keep within settled legal principles, however, if the State is held only to a duty of taking precautions against those risks 'reasonably to be perceived' . . . and if the community assumes the risk of accidental loss or damage to property by an inmate of an open institution"

There is a general divergence of opinion among psychiatrists as to their ability to determine accurately at what point an inmate is rehabilitated or to predict accurately whether he will revert to his maladjustments.³⁰ However, the long-range financial and humanitarian benefits which society receives from the release of those inmates showing strong signs of probable recovery justify the exercise of the release-discretion, and an employee making an honest error in the use of this release discretion is immune from suit.³¹ And under the doctrine of respondeat superior the state will not be liable if the employee is not.

The F.T.C.A. does not make a distinction between an honest error in judgment and a negligent error in judgment; both, by specific exception, are excluded as a basis for tort suits against the government.³² The same result has been reached in New York by judicial interpretation of its tort claim act.³³ The allowance of immunity to an official who negligently exercises his discretion has been severely criticised.³⁴ Also, the justification for such allowance is further reduced in this particular area by the wide latitude which is given, in light of the uncertainty of diagnosis, to the definition of an honest error in judgment. There-

³⁰ *United States v. Baldi*, 192 F.2d 540, 563 (3d Cir. 1951) (a psychiatrist testified, "... I have seen them [schizophrenics] stay well for twenty years and I have seen them relapse within a year...". A poll conducted by a New Jersey commission of seventy-five prominent psychiatrists reveals "... that it is impossible to predict the occurrence of serious crime with any accuracy." N.J. Report Comm'n on the Habitual Sex Offender 14, 58 (1950). Some of these psychiatrists estimated that they could be 75% to 90% accurate in predicting future criminality among sex deviates; but others believed they could make a definite prognosis in only 5% of the cases, and a number of the authorities expressed the belief that no accurate prediction could be made at all. Glueck, *Mental Disorders and the Criminal Law* 354 (1925) asserts, "The recovery rate [in schizophrenic cases] is extremely low. It [schizophrenia] may lead to almost any conceivable crime." Cf. Note, *Nebraska Statutory Revision of Punishment of Sex Offenders*, 33 Neb. L. Rev. 475 (1954).

³¹ *St. George v. State*, 283 App. Div. 245, 127 N.Y.S.2d 147, 150 (3d Dep't 1954).

³² 60 Stat. 845 (1946), as amended, 28 U.S.C. § 2680(a) provides: "Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . ."

³³ *St. George v. State*, 283 App. Div. 245, 127 N.Y.S.2d 147 (3d Dep't 1954); *Schwenk v. State*, 205 Misc. 407, 129 N.Y.S.2d 92 (Ct. Cl. 1953).

³⁴ Note, *Tort Liability of Administrative Officers in New York*, 28 St. Johns L. Rev. 275 (1954); Note, *Tort Liability of Public Officers in Tennessee*, 21 Tenn. L. Rev. 315 (1950); Note, *Tort Liability of Public Officers and Employees in Ohio*, 9 Ohio St. L.J. 501 (1948).

fore, it would seem that a test of "reasonable use of discretion" should be used to determine whether the state and the employee are liable.

The underlying basis of an employee's immunity from suit for the exercise of his release discretion is the thought that without such immunity the employee would fear numerous, unfounded suits concerning the use of his discretion and that he would, therefore, fail to exercise his discretion, thus defeating the purpose of the rehabilitation program; i.e., the release of rehabilitated inmates at the earliest possible moment. A possible solution which would retain the benefits of the above immunity and yet would provide a remedy for a claimant would be to make the state liable for the negligent release granted by its employee and yet leave the employee immune to suit. This would necessitate changing the basis of liability from respondeat superior to that of strict liability in these specific circumstances. It is submitted that this action is justified in view of the state's control of its employee's conduct through careful hiring, managing, training, and dismissal. This solution would place the cost of maintaining a rehabilitation program with its attendant risks of inaccurate discharges, a cost properly attributed to the cost of government, on society as a group instead of burdening individual members of society who are injured by such inmates.³⁵

However, assuming that respondeat superior is the basis of a tort claims act and that there is an unlimited discretionary immunity, there is the further question of the extent to which this immunity will clothe other negligent acts of the sovereign. Assume that a psychiatrist makes an incorrect diagnosis of an individual because of incorrect and inadequate information supplied to him. Or assume there is a correct diagnosis but inadequate supervision of the inmate while the inmate is on convalescent leave or parole. Will the discretion of the psychiatrist immunize negligent acts committed prior and subsequent to the exercise of the discretion? The answer to this question must be considered in the light of recent federal and New York decisions and additional public policy considerations.

In *Smart v. United States* a veteran's hospital released a mental patient for a trial visit to his home.³⁶ On his way home he stole a car and negligently injured the claimant. The claimant argued that the hospital was negligent by not adequately super-

³⁵ Ibid.

³⁶ 111 F. Supp. 907 (W.D. Okla. 1953).

vising the patient after he was released. The court denied liability on the grounds that both the release and post-release supervision were discretionary. Thus, discretion blanketed subsequent negligent acts of an inmate. This holding is in line with *Dalehite v. United States*,³⁷ which established the proposition that once discretion of a federal employee is exercised, all subsequent negligent acts of other employees are likewise clothed with immunity.

In *Kendrick v. United States*³⁸ a manager of a veteran's hospital and his psychiatrists jointly recommended the discharge of an inmate who later killed the claimant's decedent. The court held that the manager and psychiatrists could not be held liable since their acts were performed in *strict accordance* with the regulations by which they were governed. It might be inferred from the *Kendrick* case that had there not been strict compliance with the regulations prior to the use of the discretion, the government might have been held liable. But this inference is negated by *Mid-Central Fish v. United States*.³⁹ The petitioner brought an action to recover for damages to his premises caused by flood waters. He alleged injury because of his reliance upon inaccurate weather reports of the United States weather bureau. The reports were inaccurate because of negligent gathering and analyzing of weather information. In dismissing the action, the court stated:

... it is not material whether the agency or the employee used reasonable care in ascertaining the facts on which such judgment was founded . . . we believe that all data of whatever kind or character coming to the knowledge of the "agency or employee" upon which its discretion and judgment is premised falls within the intendment of the discretionary duties there exempted by Congress. Thus, though an "agency or employee" of the Government may be negligent in accumulating data upon which a "discretionary duty" is performed, it would appear to fall within the ambit of the above exception⁴⁰

Thus discretion may be construed to immunize all wrongs even though a correct assembling of facts would have resulted in a correct report.

In *St. George v. State* ⁴¹ an inmate on convalescent leave from a New York mental institution stabbed seven persons, fatally

³⁷ 346 U.S. 15 (1953).

³⁸ 82 F. Supp. 430 (N.D. Ala. 1949).

³⁹ 112 F. Supp. 792 (W.D. Mo. 1953).

⁴⁰ Id. at 798, 799.

⁴¹ 283 App. Div. 245, 127 N.Y.S.2d 147 (3d Dep't 1954).

wounding four. The claimant alleged that the incorrect diagnosis of the inmate was caused by the failure of the institution's staff to present crucial information to the psychiatrist who made the diagnosis. The trial court found that there had been negligence in gathering the information and held for the claimant even though there was a later use of discretion based upon this information.⁴² The appellate court reversed on the facts, finding no negligence in the gathering of the information, and held that the release was merely an error in judgment for which the sovereign could not be held liable.⁴³ The ultimate decision on this case, however, is in doubt since it is still on appeal.⁴⁴ It would seem that while the case was reversed on its facts, and despite contrary federal decisions, the logic of the trial court's holding is valid in light of policy considerations which will be discussed in a later section.

B. Failure in the Rehabilitative Process

If the discretionary immunity is to cover all negligent as well as honest errors in judgment and all subsequent and prior negligent acts, then there is no need to analyze what is a reasonable standard of care in the field of rehabilitation. However, if the discretionary immunity doctrine can be limited, either by legislation or judicial interpretation, so as to expose the above negligent acts to attack, the claimant must then surmount the problem of whether the sovereign exercised a reasonable standard of care in releasing the inmate. In determining whether the sovereign deviated from a reasonable standard, there are two main criteria—custom and proposed standards by experts.

While the nation's mental institutions have essentially the same problems, the methods used by each vary according to (1) the local public's evaluation of the relative desirability of the custodial and rehabilitation functions and (2) the institution's financial appropriations.

Despite these problems of variance, the claimant may introduce evidence of methods used in similar institutions, or the sovereign may introduce the methods of similar institutions to prove compliance with such customary standards. This evidence becomes conclusive as to reasonable conduct if no adverse evi-

⁴² 203 Misc. 340, 118 N.Y.S.2d 596 (Ct. Cl. 1953).

⁴³ 283 App. Div. 245, 127 N.Y.S.2d 147 (3d Dep't 1954) (under New York appellate procedure for tort claims, both fact and law are reviewed, N.Y. Laws c. 860 § 24 (1939)).

⁴⁴ 307 N.Y. 869, 120 N.E.2d 860 (1954).

dence is introduced.⁴⁵ However, custom, notwithstanding its long established usage, is not infallible since either party may point out that the customs of similar institutions were not in fact reasonable.⁴⁶

The unreasonableness of the sovereign's methods may be proved by utilizing experts who testify as to what the standards should be. Expert standards can be obtained through such a publication as "The Mental Health Program of the Forty-Eight States"⁴⁷ or through the provisions of the "National Mental Health Act."⁴⁸ These sources supply both statistics and comments on uniformity and validity of state and federal practices. However, such evidence could not show the sovereign was negligent in not using the latest and most progressive methods if the methods in use in the institution were already in fact reasonable.⁴⁹

Instead of the present system of obtaining evidence of a reasonable standard of care from the various conflicting jurisdictions, a system of specific standards of administrative procedure could be incorporated into the governing statutes on mental institutions. This would supply both the institution and claimant with a norm of reasonable conduct, thus restricting the area of investigation and bringing about a corresponding reduction in the expenses of litigation in this area. It is submitted that if a tort claims act is passed in Nebraska, the legislature should also amend the governing statutes⁵⁰ of the mental institutions to provide for a detailed description of minimum administrative procedures for (1) gathering information on an inmate, both inside and outside the institution, (2) transmitting this information to the psychiatrist who makes the release diagnosis, and (3) supervising inmates after release.

⁴⁵ *Virginia Stage Lines v. Newcomb*, 187 Va. 677, 47 S.E.2d 446 (1948); *Schentzel v. Philadelphia National League Club*, 173 Pa. Super. 179, 96 A.2d 181 (1953); *Blake v. Fried*, 173 Pa. Super. 27, 95 A.2d 360 (1953).

⁴⁶ *Saglimbeni v. West End Brewing*, 274 App. Div. 201, 80 N.Y.S.2d 635, 83 N.E.2d 18, 338 U.S. 892 (1948); *Uline Ice v. Sullivan*, 187 F.2d 82 (D.C. Cir. 1950); *Reagh v. San Francisco Unified School District*, 259 P.2d 43, 119 Cal. App. 2d 65 (1953); *Blake v. Fried*, 173 Pa. Super. 27, 95 A.2d 360 (1953); *Witherspoon v. Haft*, 157 Ohio St. 474, 106 N.E.2d 296 (1952); *Kuettel v. Vradenburg*, 239 S.W.2d 869 (Tex. 1951).

⁴⁷ *The Council of State Governments* (1950).

⁴⁸ 58 Stat. 691 (1946), 42 U.S.C. §§ 241, 242(a), 245 (1952).

⁴⁹ *Lee v. Pennsylvania R.R.*, 192 F.2d 226 (2d Cir. 1951); *Virginia Stage Lines v. Newcomb*, 187 Va. 677, 47 S.E.2d 446 (1948) (practical method).

⁵⁰ Neb. Rev. Stat. §§ 83-101 to 83-123 and 83-305 to 83-360 (1943).

C. Liability for a Failure in the Rehabilitative Process

Only one court has applied the "anticipated risk" test where the state has failed to rehabilitate a mental patient. In the *St. George* case⁵¹ a released mental patient, four days after his release, brutally attacked seven persons, killing four of them. The court allowed recovery. However, the difficulty in applying the "anticipated risk" test to individual fact situations is illustrated by the following summary of a mental patient's history as presented in *United States v. Baldi*.⁵²

There, prior to his entrance into the Army, the subject had a long history of larceny, drug usage, drinking, and confinement in institutions. While he was in the Army, he suffered from a "nervous condition." After his discharge he stole an automobile and was sentenced to a New York hospital. He was released from this hospital as "recovered" despite a three-one decision of the staff physicians that he was still insane and not ready for release. Subsequent to this release he stole a car, and was caught, convicted, and sentenced to a penitentiary. One month after his release from the penitentiary, he was committed to another prison. Shortly after his release from the prison, he stole a gun and killed a person.

If a court were to find that, in light of the three-one decision that he was still insane, the discharge of the inmate was negligent and not within the discretionary immunity of the state, should the state be held liable for the inmate's (1) stealing a car some four months after release, (2) stealing a gun some two years after release, or (3) the killing of a person two years after his release? Under the "anticipated risk" test, it could be argued that the negligent release of an insane person whose record included alcoholism, larceny, auto theft, marijuana, and homicidal tendencies would involve the risk that he would again commit these or like crimes after his release. However, his incarceration in another mental hospital and his sentences to two prisons could be considered "intervening" factors which were the true proximate cause of the injuries inflicted by him. In addition, are the crimes so remote as to be outside the orbit of the anticipated risk? These are some of the problems to be answered in future cases. In answering these questions many policy factors must be considered.

⁵¹ 203 Misc. 340, 118 N.Y.S.2d 596 (Ct. Cl. 1953).

⁵² 192 F.2d 540, 561 n.39 (3d Cir. 1951).

D. *Public Policy Considerations*

Let us assume that a claimant has been injured by a negligently released or supervised inmate. Unless there are compelling arguments against recovery, it appears inequitable to force the injured claimant to sustain a larger proportion of the financial burden of the state's rehabilitation program than his fellow taxpayers.

It is argued that to allow recovery would cause the state to be reluctant to release inmates. As a result there would be unnecessary confinement of inmates who could be returned to society as useful citizens.⁵³ But in all probability the financial costs of unnecessary confinement would force the state to release inmates, since unnecessary confinement leads to overcrowded conditions and resulting higher expenses. In contrast, the cost of maintaining an inmate on convalescent leave or parole is negligible when compared to the costs of confinement. Also, overcrowded conditions may result in increased escapes, assaults, and other tortious acts which burden the state financially. Furthermore, the sovereign may be able to recover partial indemnity against the negligent employee.⁵⁴ Therefore, faced with this financial dilemma, the state is more likely to carry out the mandate of its statutes—rehabilitation and the release of rehabilitated inmates—than to confine them unnecessarily.

III. CONCLUSION

A. *The Custodial Duty*

The federal courts' interpretation of the "assault and battery" exception in the F.T.C.A. produces unnecessary and undesirable restrictions on tort recoveries against the government, while the New York statutes and interpretations thereof have reached a more equitable and logical result. Therefore, it is urged that the Nebraska legislature refrain from placing such exceptions in any tort claims act which might be adopted. Additionally, in order that reasonable measures may be taken to guard adequately against an inmate's dangerous propensities, it would be well for the legislature to revise the governing statutes of mental institutions contemporaneously with the passage of a claims act so as to provide a method which insures that full evaluation of an inmate will be made through the use of F.B.I., Red Cross, and family questionnaires.

⁵³ See *Schwenk v. State*, 205 Misc. 407, 129 N.Y.S.2d 324 (Ct. Cl. 1953).

⁵⁴ 8 Miami L.Q. 655 (1954); 29 St. John's L. Rev. 145 (1954).

B. The Rehabilitation Duty

The "discretionary immunity" provisions of the F.T.C.A. and the New York courts' interpretation of that state's act has unduly blanketed (1) the sovereign's employee's negligent release diagnosis, (2) prior negligence in gathering information to be used as a basis for the employee's release diagnosis, and (3) negligent supervisory acts committed subsequent to the exercise of the release discretion. It is submitted that the Nebraska legislature should limit an individual employee's discretionary immunity to reasonable acts, as contrasted from negligent acts. If the legislature is not willing to subject the employee who exercises the release discretion to liability for his negligent acts, the legislature should specifically provide that the state will be liable for these acts despite the limitations of the doctrine of respondeat superior.

In supplementing the above provisions, the legislature should specify in the governing statutes of state mental institutions the standards of reasonable administrative procedures that should govern those acts which are prior or subsequent to the release discretion; viz, such standards as are proposed by the "Mental Health Program of the Forty-Eight States" or by "The National Mental Health Act." A violation of these standards would be negligence per se since their purpose would be to provide a guide of reasonable conduct.

C. Future Ramifications

It must be noted that the rehabilitative duty, which both the New York and federal courts have used to restrict the right of protection of individual society members, is a duty which is owed exclusively to the sovereign and not to the individual. Over the short span of a generation, psychiatry and psychology have made great advances toward the accurate diagnosis and prognosis of the mentally maladjusted. Rehabilitation has grown from an ideal to a positive and workable process whereby many of the mentally ill are returned to society as useful citizens. As psychiatry and psychology delve still deeper into the nebulous area of human behavior, the word "rehabilitation" will take on a more concrete form. It is possible that this will cease to be a duty owed only to the state and, instead, will become a legal obligation owed to the inmate to convert him within a reasonable time from a maladjusted individual into a useful citizen. However, this latter cause of action by an inmate against his keepers will remain unborn until (1) society's apathy and misunderstanding of

the mentally ill is replaced by enlightened concern over the care and cure of these unfortunates, and (2) psychiatrists and psychologists are able to diagnose, cure, and prognosticate both mental and criminal behavior to a much higher degree than is now possible. Only then will the courts interpret the *duty of rehabilitation* as a concrete *cause of action*.

The Nebraska legislature should take cognizance of this possible field of recovery. The federal courts have interpreted the F.T.C.A. to exclude the claims of prisoners,⁵⁵ and this interpretation has been severely criticized.⁵⁶ While it is doubtful that such an interpretation can be extended to other wards of the state, the legislature should take care to eliminate the possibility of such an inequitable result by specifically providing that any ward of the state can file a claim under the state tort claims act.

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